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Staff Report: Appeal Substantial Issue Determination

Application numberA-3-MCO-04-012, Laube & Engel

Applicant.....Sheldon Laube & Nancy Engel

AppellantsDr. & Mrs. Hugh McAllister; and, Commissioners Burke and Wan

Project location.....36240 Hwy.1 (Kasler Point), approx. 0.5 mile south of Garrapata Creek, Big Sur Coast, Monterey County (APNs 243-251-012 & 243-251-013).

Project descriptionConstruct a 8,270 sq.ft. single family residence with an approx. 1,824 sq.ft. subterranean garage, including development within 100 feet of environmentally sensitive habitat (ESHA), approx. 1,750 cubic yards of cut and 736 cubic yards of fill, slopes over 30 percent, and a lot line adjustment that will consolidate two (nominal) 2-acre parcels; property was partially developed pursuant to Coastal Development Permit no. A-174-77.

Local approval.....The Monterey County Board of Supervisors, upon appeal, approved a Combined Development Permit (including four Coastal Development Permit components), Resolution 03073 (PLN010105), for the project on January 13, 2004.

File documents.....Monterey County certified Local Coastal Program, including Big Sur Coast Land Use Plan; Final Local Action Notice 3-MCO-04-027; documents and materials from the local record provided by Monterey County on February 2, 2004; Coastal Development Permit no. A-174-77 (Sorensen), approved August 3, 1977.

Staff recommendation ...**Substantial Issue**

I. Recommended Findings and Declarations for Substantial Issue:

Monterey County approved a coastal permit for the construction of an 8,270 sq.ft. single family residence with associated grading, between Highway 1 and the sea, on a granitic headland along the northern portion of the Big Sur Coast. The project site, known as Kasler Point, is adjacent to the State Coastal Corridor's 2-acre open space property that



California Coastal Commission
March 18, 2004 Meeting in Monterey

Staff: L. Otter Approved by:

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protects the seaward view from the Abalone Cove Vista Point, one-half mile south of Garrapata Creek on the Big Sur Coast Highway. Project location and plans are attached as Exhibit 1. The County's coastal permit resolution is attached as Exhibit 2.

The project has been appealed to the Coastal Commission on the basis that it is inconsistent with a substantial number of different policies and implementing ordinances of the Monterey County Local Coastal Program (LCP). The submitted reasons for the appeal by Commissioners Burke and Wan are attached to this report as Exhibit 3. And, the submitted reasons for the appeal by Dr. & Mrs. Hugh McAllister are attached to this report as Exhibit 4.

In particular, the following LCP conflicts and issues are highlighted as raising a substantial issue:

Scenic views—project inconsistent with applicable standard of review. Both appeals raise the issue of scenic view protection.

The Big Sur Coast Land Use Plan (LUP) visual resource Key Policy section 3.2.1 generally prohibits new development visible from Highway 1 and other defined public vantage points (i.e., in the Critical Viewshed). The purpose of this LCP policy is to protect the Big Sur Coast's highly scenic views, enjoyed by millions of visitors per year, from the individual and cumulative impacts of development. Such protection is achieved, in part, by requiring that new projects be concealed from public view. However, as approved by the County, this project, located between Highway 1 and the sea, will be visible from the Highway and has not been sited and designed to avoid impacts to the Critical Viewshed as required by the LCP.

Specifically, the Big Sur Coast Land Use Plan's Critical Viewshed Policy states:

3.2.1 Key Policy

Recognizing the Big Sur coast's outstanding beauty and its great benefit to the people of the State and Nation, it is the County's objective to preserve these scenic resources in perpetuity and to promote the restoration of the natural beauty of visually degraded areas wherever possible. To this end, it is the County's policy to prohibit all future public or private development visible from Highway 1 and major public viewing areas (the critical viewshed), and to condition all new development in areas not visible from Highway 1 or major public viewing areas on the siting and design criteria set forth in Sections 3.2.3, 3.2.4, and 3.2.5 of this plan. This applies to all structures, the construction of public and private roads, utilities, lighting, grading and removal or extraction of natural materials.

As acknowledged by the County findings, the proposed house *will* be visible from Highway 1. The findings incorrectly state that the project is not located within the Critical Viewshed. Therefore, the County's approval is inconsistent with the applicable LUP policy, and a substantial issue of LCP conformance is raised.

Scenic views—project not in an exception area. The Big Sur Coast LUP does in fact allow an exception for new residences on vacant lots in certain partially-developed residential enclaves located in the Critical Viewshed--including the nearby Rocky Point area. The County's approval is based on application of the standards for development in this exception area. LUP Policy 3.2.5.F defines the Rocky Point exception area as follows:

Existing vacant residential parcels in the critical viewshed between Highway 1 and the sea, from (and including) the southernmost existing residential parcel on Rocky Point, to the northernmost developed residential parcel on Kasler Point and from the southernmost developed parcel north of Abalone Cove to the northernmost developed parcel south of Garrapata Creek...

The subject site is located *north* of the northernmost developed residential parcel on Kasler Point and *south* of the southernmost developed parcel north of Abalone Cove. Therefore, the residence does not fall within either of the two segments of the defined exception area. Accordingly, the County applied the incorrect standard of review in admitting that the proposed house will be visible from Highway One, but then saying that the LCP allows for it under the criteria for the Rocky Point exception area.

Scenic views—project inconsistent with standard of review used by County. Even if Policy 3.2.5.F is accepted as the governing policy, the proposed project would not be consistent with the special standards for the Rocky Point exception area. Location in a residential exception area does not mean that “anything goes” or that the lot is somehow no longer in the Critical Viewshed.

Instead, the exception area standards allow residential use on existing lots in the Critical Viewshed *if* measures are incorporated to insure that visual impacts are *minimized* and do not block ocean vistas as seen from Highway 1 (LUP 3.2.5.F). The policies call for siting on the portion of the lot least visible from public viewpoints (LUP 3.2.4.A.2). Modifications for siting, design, size and access are required where needed to insure that new development be designed to blend in with, and be subordinate to, the natural environment (LUP 3.2.4.A.3). Dedication of a scenic easement over the undeveloped portion of the lot is required (LUP 3.2.5.F, and CIP Section 20.145.030.B).

In this case, the proposed 8,270 sq.ft. structure is far too large to blend in with, and be subordinate to the natural environment. As noted by appellant McAllister, the location on the property is not “the least visible.” Alternatives are available for minimizing impacts on Highway 1 views, including a substantial reduction in size, and alternative orientation or siting on the lots. The existing coastal permit (A-174-77 Sorensen) for a 3,950 sq.ft. residence demonstrates that it would be feasible to minimize visual impacts, to the point where a reasonably-sized structure would not be seen at all. But, this currently-appealed project's size and visually prominent location prevent conformance with the LCP's visual resource protection policies for views seen from Highway 1. Therefore, the project clearly is *not* consistent with LCP standards—even if it were evaluated in accordance with the standards for the Rocky Point exception area.

Scenic views—requirement for visual demonstration. In addition to the LCP inconsistencies highlighted above, the McAllister’s appeal also includes an illustration in support of their contention that local approval was based on “false and misleading [visual demonstration] materials submitted by applicant.” In order to evaluate conformance with the scenic resource protection policies, the LCP requires that all “...proposed buildings shall be accurately indicated as to dimensions, height, and rooflines...” (LUP 3.2.3.B.1) Because the LCP requires very particular procedures for determining visibility/non-visibility in the Critical Viewshed, including photographic representations; because these determinations are required to be based on accurate representations; and because the County apparently relied, at least in part, on potentially faulty representations, a substantial issue of LCP conformance is raised.

Scenic views—conclusion. In this case, it is demonstrably feasible to conceal even a large home from Critical Viewshed vantage points. The County applied 26 conditions of approval, but these will not result in the modifications needed to conform with LUP policies. (County Findings and Conditions of Approval attached as Exhibit 2.) Furthermore, the LCP’s remedies for situations where a house cannot be hidden (or redesigned) are Transferable Development Credits (TDCs) or public acquisition, not "mitigation" of impacts. Accordingly, a substantial issue of LCP conformance is raised, regardless of whether or not the Rocky Point exception standards are applicable.

The Coastal Commission has already granted a permit for a very generous-sized home on this site, that will conform to the LUP’s Critical Viewshed policy. There is no compelling need to approve an even larger home that does not meet this policy.

Hazard avoidance. The McAllister appeal raises the issue of conformance with the LCP’s policies for development in hazardous areas.

The LCP’s Big Sur Coast policies require that blufftop setbacks “shall be adequate to avoid the need for seawalls during the development’s economic lifespan.” (LUP 3.9.1.1). Also, the development must not create a geologic hazard or diminish the stability of the area (LUP 3.7.3.A.9).

Geologic and geotechnical investigations have been prepared for this site. These reports confirm that the site comprises a layer of coastal terrace alluvium perched on granite bedrock. Substantial excavation of the landform is already evident. Active sea cliff erosion was noted.

While the overall erosion rate may not be great, unanticipated events can and will occur. A future El Niño season, for example, may produce an accelerated erosion episode. One way to reduce the risk of such failure is to maximize the distance from the bluff edge. However, due to the need to accommodate the project’s great bulk, applicant’s house would extend closer to the bluff edge than a similar but more modestly-scaled design on the same site.

Also, as experience has shown, a project's septic, drainage, and irrigation systems can saturate the bluff and diminish the stability of the site. Appellant McAllister submitted a letter excerpt from a Registered Engineering Geologist that states: "...the project has numerous significant adverse environmental impacts related to geology and soils hazards, hydrology and water quality that require the preparation of an Environmental Impact Report." But, this recommendation was not accepted, and the County's approval did not require applicant to reduce the excessive area of impervious surface as a means of reducing saturation, runoff and erosion impacts (i.e., through reduced roof, driveway and patio coverage).

In summary, if the proposed house is sited too close to the seaward edge of the coastal bluff, then the project could be threatened with collapse, and may need to be retrofitted with a seawall after the project is built. The natural shoreline erosion process can be aggravated by imprudent handling of on-site drainage issues. Available mitigation measures, such as the reduction of structural mass in order to reduce impervious roof area, have not been employed. A substantial issue of LCP conformance—particularly with respect to the above-cited LUP policies—is raised accordingly.

Environmentally sensitive habitat areas. The McAllister appeal raises the issue of conformance with the LCP's policies for protecting environmentally sensitive habitat areas. The project's Biological Assessment report notes the presence of a plant species—seacliff buckwheat—that is a host plant for the Federally-endangered Smith's blue butterfly and is an indicator for environmentally sensitive habitat. Coastal scrub, and the marine and rocky near-shore habitats found on the parcel are environmentally sensitive as well.

The LCP gives high priority to the protection of the Big Sur Coast's environmentally sensitive habitat areas (ESHAs). When developments must occur within ESHAs, LUP Policy 3.3.2.4 calls for limiting the removal of indigenous vegetation and favors those designs that minimize land disturbance. And, siting and design of development on parcels adjacent to intertidal habitat areas is subject to LUP Policy 3.3.3.B.1, regarding septic system percolation and sedimentation impacts.

The project will remove over 100 seacliff buckwheat plants, but the project biologist did not observe any Smith's blue butterflies at the site. According to an email response from the U.S. Fish & Wildlife Service (submitted by appellant McAllister), such negative survey results from a single year are not conclusive, and it should not be concluded that the species does not use the site. Additional surveys are recommended.

The project also has the potential to disrupt sensitive marine habitats adjacent to the site. As noted above, the impervious surface area of the development is substantial, exceeding 10,000 sq. ft.; and, conditions for operation of the septic system, very near the bluff edge over a granitic formation, are not ideal. As approved, some risk reduction is achieved through use of a pumped sewage system to relocate the septic system farther away from the bluff edge. However, additional potential mitigation measures were not employed.

These include a substantial reduction in site coverage, and a proportional reduction of septic system size.

Therefore, the proposed development raises the issue of conformance with LCP Environmentally Sensitive Habitat Area protection policies.

Water quality protection. The McAllister appeal also raises the issue of conformance with the LCP's policies for protecting water resources.

The LUP's Specific Policies for Water Supply and Use contain a series of requirements concerning provision of adequate and safe water supplies, as a prerequisite for residential development (LUP 3.4.3.A). The appellant questions the project's compliance with these County standards.

Water will be supplied to the site by the Garrapata Water Company, which draws from a well near Garrapata Creek. This stream is listed by as a steelhead stream (LUP 3.4.3.B.3), and the impact of all new development proposals on these streams must be considered (LUP 3.4.3.B.1). The proposed development will cumulatively add to the amount of water diverted from the Garrapata basin.

The LUP Water Resource policies, in section 3.4.2.2, also require that erosion and sedimentation impacts be avoided. As cited above, the location and design of development on parcels adjacent to intertidal habitat areas is subject to LUP Policy 3.3.3.B.1. The purpose of this policy is to avoid septic system percolation and sedimentation impacts. The proposed building site is on shallow coastal terrace colluvium over granite bedrock. Storm water runoff and septic system leachates from the development have the potential to adversely impact adjoining tidepools and rocky intertidal habitats that are part of the Monterey Bay National Marine Sanctuary.

Alternative designs that would reduce the potential for sediments and septic system leachates, through reduced project sizing, were not pursued. A substantial issue of conformance with the LCP's water resource and water quality protection policies is raised accordingly.

Procedural questions: The County's approval of this application presents a number of unresolved jurisdictional and procedural issues. Coastal Act Section 3060 These issues include, but are not limited to, the following:

1. The Coastal Commission appeal notes that the County action references the Coastal Commission's earlier permit for a home on this site and the need to amend that permit.

Specifically, the Coastal Commission, upon appeal, granted Coastal Development Permit no. A-174-77 for a 3,950 sq.ft. residence to Donald Sorensen on August 3, 1977.

Permittee accepted the permit, recorded a scenic easement and commenced grading, installed water connections, constructed a driveway and commenced construction of the residence (which has not proceeded beyond the foundation). The work was sufficient to

exercise the permit, but this 4 acre site on Kasler Point remains essentially undeveloped. The permit also required merger of the two lots comprising the site, but it is not clear that this was completed. In any event, the existing Coastal Commission CDP has not been relinquished. The Coastal Commission retains jurisdiction with respect to condition compliance and any permit amendments.

The County was advised that the Coastal Commission would be the appropriate venue for consideration of amended plans. Applicants have nonetheless pursued a separate CDP application with the County for essentially the identical site. Thus, a question is raised as to the proper procedure that the Coastal Commission should follow in considering this item.

2. As pointed out by Appellant McAllister, the residential plans newly approved by the County would not be consistent with the current, valid CDP and would violate the terms of approval that were adopted in 1977.
3. Appellant McAllister asserts that there are pending grading and construction violations that, under the County's LCP procedural rules, should have precluded action on the application.

II. Recommended Motion and Resolution

MOTION:

*I move that the Commission determine that Appeal No. A-3-MCO-03-090 raises **NO** substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a *de novo* hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-3-MCO-03-090 presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

III. Appeal Procedures:

Coastal Act Section 30603 provides for the appeal of approved coastal development permits in jurisdictions with certified local coastal programs for development that is (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance; (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff; (3) in a sensitive coastal resource area; (4) for counties, not designated as the principal permitted use under the zoning ordinance or zoning district map; and (5) any action on a major public works project or energy facility. This project is appealable to the Coastal Commission because it is located between the first public road and the sea; and, because it is less than 300 feet from the edge of the coastal bluff.

The grounds for appeal under Section 30603 are limited to allegations that the development does not conform to the standards set forth in the certified LCP or the public access policies of the Coastal Act. Section 30625(b) of the Coastal Act requires the Commission to conduct a *de novo* coastal development permit hearing on an appealed project unless a majority of the Commission finds that “no substantial issue” is raised by such allegations. Under Section 30604(b), if the Commission conducts a *de novo* hearing, the Commission must find that the proposed development is in conformity with the certified local coastal program. Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act, if the project is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone. This project is located between the first public road and the sea and thus, this additional finding would need to be made in a *de novo* review in this case.

The only persons qualified to testify before the Commission on the substantial issue question are the Applicant, persons who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing. Any person may testify during the *de novo* stage of an appeal.